IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D19-1362
LOWER CASE NO. 19-06869 CA (15)

JAMES ERIC MCDONOUGH,

Plaintiff/appellant,

v.

CITY OF HOMESTEAD,

Defendant/appellee.

REPLY BRIEF OF DR. JAMES ERIC MCDONOUGH

ON APPEAL FROM A FINAL ORDER ENTERED IN THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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ABBREVIATIONS USED IN THIS BRIEF

References to appellant/plaintiff, Dr. James Eric McDonough, shall appear as "McDonough."

References to appellee/defendant, City of Homestead, shall appear as the "CITY."

References to CITY Clerk, Elizabeth Sewell, shall appear as "Sewell."

References to Assistant Clerk, Julissa Chavez, shall appear as "Chavez."

References to Police Aide, Paula Carballosa, shall appear as "Carballosa."

References to the Amended Petition for Writ of Mandamus, shall appear as "Amended Petition."

References to CITY's Answer and Affirmative Defenses, shall appear as the "Response."

References to Florida Statute §, shall appear as "FS."

References to the appellant's appendix will cite the page number and the paragraph number if applicable, and shall appear as "[App. p. #, ¶ #]."

INTRODUCTION

This brief is in reply to the CITY's response brief filed November 4, 2019. In CITY's response brief, CITY does not contest the relief sought by McDonough. Said relief being in the form of a remand to the trial court for an evidentiary hearing.[1]

CITY correctly notes that the trial court's legal conclusions and interpretation of precedent are subject to *de novo* review, *Bank of America v. Delgado*, 166 So. 3d 857, 860 (Fla. 3d DCA 2015). CITY also correctly notes that a trial court's decisions to grant an evidentiary hearing is subject to *de novo* review. *Hollis v. Massa*, 211 So. 3d 266, 267 (Fla. 4th DCA 2017) (citing *Owen v. State*, 986 So. 2d 534, 543 (Fla. 2008)).

CITY has argued two points; I) that the petition for writ of mandamus cannot be considered an action for declaratory relief; and II) that the affidavits filed by CITY are valid. Due to the nature of *de novo* review, and in an abundance of caution and to avoid any claim of waiver or concessions on these issues McDonough addresses these points below.

ARGUMENT

I. The Petition Should be Considered as a Declaratory Action.

City alleges that the petition for writ of mandamus filed by McDonough cannot be treated as a complaint for declaratory relief.

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[1] CITY concedes McDonough has a right to a hearing, however, CITY appeared to argue during litigation that McDonough has no right to an "evidentiary" hearing.

FS. 86.011(2), authorizing declaratory relief, states in part that:

> ...any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

FS. 86.101 states:

> **This chapter is declared to be substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights**, status, and other equitable or legal relations **and is to be liberally administered and construed.**

The Amended Petition though not styled as a complaint for declaratory relief, implicitly requested such relief. The Amended Petition alleged that CITY's delay in producing responsive documents was unlawful, [App. p. 15, ¶ 18], and requested an order to show cause or alternatively a writ of mandamus requiring CITY to prove the reasonableness of its delay. [App. p. 15, ¶20]. Also, the prayer for relief requested not only that CITY be required to prove the reasonableness of the delay, but also requested "for such other relief as is just and proper in the circumstances." [App. p. 15, last paragraph].

Certainly, McDonough is insecure and uncertain in his rights to timely receive all responsive and non-exempt records. Further, as CITY contests McDonough's legal allegations, there is presented a bonafide and justiciable dispute. Whereas, liberal construction mandated by both FS. 86 *et seq*. and the *pro se* pleadings require viewing the Amended Petition as an action for declaratory relief. [2]

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[2] *Pro se* filings are to be held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972).

There is nothing legally precluding McDonough's Amended Petition being reviewed as a complaint for declaratory relief. The precedent cited by CITY in support of its position is inapposite as instantly the relief was properly plead, CITY was properly served, and there are no allegations or evidence of record otherwise.

Therefore, based upon the above McDonough's Amended Petition, when liberally construed, would be properly read as an action for declaratory relief.

In the alternative, after remand, McDonough should be: a) put on notice of any defects in the pleadings; and b) allowed to amend his petition/complaint to include claims/prayers for declaratory, injunctive relief, or other equitable relief before final dismissal of the action.

II. The Affidavits Filed by CITY are Not Valid.

First off, assuming, arguendo, that the two (2) affidavits filed by CITY are valid and true, they still fail to cure the CITY's *prima facie* unlawful response(s) to McDonough's public records request. The CITY's only claim that it; a) **provided all responsive records** in its possession; **and** b) **did not violate the Public Records Act** are the unsworn claims of its attorney made in its Response to the alternative writ. Whereas, unsworn allegations of an attorney have no evidentiary value.[3]

[3] CITY's unsworn allegations are in direct conflict with the Verified Amended Petition and Verified Notice(s) of Filing. As the unsworn allegations have no evidentiary value without more they must necessarily fail.

"As we have explained, we reject the use of unsworn assertions made by attorneys as evidence." *Smith v. Smith,* 64 So. 3d 169 (Fla. 4th DCA 2011). A trial court "cannot rely upon these unsworn statements of fact as the basis for the trial court's factual determinations… [and the appellate court] cannot so consider them on review of the record." *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015 (Fla. 4thDCA 1982).

The CITY's unsworn Response relies upon the Sewell and Carballosa Affidavits. Yet, neither affidavit states, as alleged in the Response, that all responsive non-exempt records in the CITY's possession have been produced to McDonough. Further, neither affidavit provides sufficient justification for the initial *prima facie* unlawful delay, nor does either affidavit even attempt to explain why it took CITY five (5) attempts to produce what it claims are all responsive records.[4]

A. The Sewell Affidavit was Not Properly Notarized.

CITY argues that McDonough's allegation that it was improper for Julissa Chavez (hereafter "Chavez") to notarize the affidavit is incorrect and based on an incomplete reading of the statute. CITY further states: "[b]ecause Ms. Chavez

[4] McDonough contends that CITY has still not produced all responsive and non-exempt records. As CITY has falsely asserted multiple times that all responsive records were produced "discovery in a context such as the one at hand may well be appropriate in the circumstance where a good faith belief exists that the public agency may be playing 'fast and loose' with the requesting party or the court, once its statutorily delegated authority is activated." *Lorei v. Smith*, 464 So. 2d 1330, 1333 (Fla. 2d DCA 1985), review denied, 475 So. 2d 695 (Fla. 1985). Therefore, McDonough respectfully requests rights to discovery after remand.

notarized the affidavits as part of her employment with the City and received no financial benefit other than her salary, no violation of section 117.107(12) occurred.

FS. 117.107(12) states:

> **[a] notary public may not notarize a signature on a document if the notary public** has a financial interest in or **is a party to the underlying transaction**; however, a notary public who is an employee may notarize a signature for his or her employer, and this employment does not constitute a financial interest in the transaction nor make the notary a party to the transaction under this subsection as long as he or she does not receive a benefit other than his or her salary and the fee for services as a notary public authorized by law.

While it is true that Chavez's employment with CITY does not disqualify her for having a financial interest, or as an underlying party, the CITY's argument woefully misses the mark. It was not alleged that it was improper for Chavez to notarize Sewell's affidavit because of her employment with CITY. It was alleged that as Chavez was the person who responded to and acknowledged McDonough's request, as well as being copied to the subsequent communications, that Chavez was for this reason a party to the underlying transaction.

Therefore, as Chavez was a party to the underlying transaction, i.e. the records request at issue, it is a violation of FS. 117.107(12) for Chavez to notarize Sewell's affidavit, and said affidavit is invalid.

Dated: December 3, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been served by email on counsels for Defendant, Matthew Mandel at MMandel@WSH-law.com, Samuel Zeskind at SZeskind@wsh-law.com, and Matthew Pearl at mpearl@wsh-law.com, as well as City Clerk Elizabeth Sewell at ESewell@cityofhomestead.com on this 3rd day of December 2019.

Dr. James Eric McDonough, *pro se*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Dr. James Eric McDonough, *pro se*